

**Appendix D**

**Prepared By:**

**Return To:**

**DECLARATION OF ENVIRONMENTAL RESTRICTIVE COVENANTS**

1. This \_\_\_\_\_ day of \_\_\_\_\_, 2008, T.L. Diamond & Company, Inc. ("TLD"), a Delaware corporation, hereby records this Declaration of Environmental Restrictive Covenants that specifies certain land and groundwater use restrictions on real property (the "Property") that TLD owns in the County of Montgomery, State of Illinois, more particularly described and known as:

Tract 1: Part of the southeast quarter (SE $\frac{1}{4}$ ) of Section 1, Township 8 North, Range 4 West, Third Principal Meridian, Montgomery County, Illinois, described as follows:

Beginning at an iron pin found at the northeast corner of said S.E. $\frac{1}{4}$ , Sec. 1, being at the intersection of two public roads, thence S 0 01' 03" W along the east line of the Section, also being along the center of Township Road 212 (T.R. 212), a distance of 495.06 feet to an iron pin; thence S 89 09' 03" W, 1757.88 feet to an iron pin; thence N 0 13' 38" W, 495.03 feet to an iron pin on the north line of said S.E. $\frac{1}{4}$ , Section 1, also being on the centerline of Smith Road; thence N 89 09' 03" E along said north line and said road, a distance of 1759.99 feet to the point of beginning (P.O.B.) containing 20.00 acres, more or less.

Tract 2: Part of the southeast quarter (S.E. $\frac{1}{4}$ ) of Section 1 and the northeast quarter (NE $\frac{1}{4}$ ) of Section 12, Township 8 North, Range 4 West and part of the southwest quarter of Section 6, Township 8 North, Range 3 West, Third principal meridian, Montgomery County, Illinois, described as follows:

Commencing at an iron pin found at the northeast corner of said S.E.  $\frac{1}{4}$ , Sec. 1, thence S 0 01' 03" W along the east line of the section, being the centerline of Township Rd. 212 (T.R. 212), a distance of 495.06 feet for a point of beginning (P.O.B.) thence continuing along said line, S 0 01' 03" W, 825.75 feet to an iron pin; thence S 29 42' 23" E, 1067.63 feet to the centerline of the abandoned C.C.C. & St. L.R.R. (Conrail); thence S 52 17' 20" W along said centerline 129.14 feet to an iron pin set at the point of curvature of a 2 curve to the right of said railroad; thence continuing along the railroad centerline on a series of chords, with iron pins at each line change, the first chord being S 54 22' 13" W, 207.97 feet; thence S 59 26' 55" W 299.88 feet; thence S 65 27' 09" W, 299.78 feet; thence S 71 27' 00" W, 299.84 feet; thence S 77 26' 51" W, 299.81 feet; thence S 83 06' 41" W, 266.85 feet; thence S 86 46' 43" W, 100.00 feet to the point of tangency of the railroad curve; thence continuing along the centerline of the railroad S 87 46' 53" W, tangent to said curve, a distance of 1416.74 feet to the intersection of the railroad

centerline and the west line of said N.E. 1/4, Sec. 12; thence N 1 06' 42" W along said west line, 49.51 feet to a chiseled X on the north right of way line of the railroad; thence continuing along said west line N 1 06' 42" W, 262.29 feet to an iron pin found at the corner between the N.E. 1/4, Sec. 12 and the S.E. 1/4, Sec. 1; thence continuing N 1 06' 42" W along the west line of the S.E. 1/4, Sec. 1, 303.32 feet to an iron pin on the south right of way line of East Water Street; thence N 89 23' 13" E along said right of way, 30.00 feet to an iron pin at the southeast corner of East Water Street and Larkin Street; thence N 1 06' 42" W along the east line of Larkin Street, 42.74 feet to an iron pin; thence N 89 52' 04" E, 256.15 feet to an iron pin; thence N 5 09' 55" E, 102.05 feet to an iron pin; thence N 89 50' 42" E, 559.97 feet to an iron pin; thence N 0 13' 38" W, 884.80 feet to an iron pin on the north right of way line of Brailey Street; thence N 89 57' 04" E along said line, 39.30 feet to an iron pin; then N 0 13' 38" W, 810.80 feet to an iron pin which marks the southwest corner of Tract 1, as described above, thence N 89 09' 03" E, 1757.88 feet to the point of beginning, containing 117.15 acres, more or less, excepting therefrom a strip of right of way 49.5 feet wide north of centerline of the abandoned centerline as described herein, said exception being 3.76 acres, more or less, thus leaving 113.39 acres, more or less, as the total for Tract 2.

2. On the Property, there is the Eagle Zinc Site (the "Site"), which the U.S. Environmental Protection Agency ("U.S. EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605, placed on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in Volume 72 of the Federal Register on September 19, 2007, pages 53463-69.
3. U.S. EPA anticipates that it will select a remedial action for the Site (the "Remedial Action") by issuing a Record of Decision. The Remedial Action may include land and groundwater use restrictions consistent with those in this declaration of environmental restrictive covenants.
4. TLD has agreed to implement the land and groundwater use restrictions on the Property, in a Consent Decree entered on \_\_\_\_\_ 200\_\_ in the case of *United States v. T.L. Diamond & Company, Inc. et al.*, Civil Action No. \_\_\_\_\_ (C.D. Ill.) (the "Consent Decree"), which requires TLD: (a) to provide a permanent right of access over the Property to the State of Illinois and the United States for purposes specified in the Decree; (b) to limit permanently the use of the Property, for the purpose of protecting human health, the environment and the remedial action; and (c) to reserve an environmental easement and restrictive covenants running with the land that imposes the land and groundwater use restrictions listed in paragraph 5 below and is enforceable by the United States and the State of Illinois.
5. RESTRICTIONS ON USE: The following restrictions apply to the Property, unless and until they are modified in accordance with Paragraph 6:

- 5.1 No disturbance of cover: Except as provided in a plan approved by U.S. EPA with Illinois EPA concurrence, no action shall be taken to excavate or drill or intrude into, or penetrate or otherwise disturb any facility cover that may be demarcated as part of the Remedial Action to be selected by U.S. EPA for the Site.
- 5.2 No interference with remedy: There shall be no interference of any sort, with the construction, operation, maintenance, monitoring, efficacy, or physical integrity of any component, structure, or improvement resulting from or relating to the Remedial Action on the Property. No action shall be taken that would cause waste materials covered as part of the remedy to become exposed.
- 5.3 Land uses: The Property shall not be used for any of the following purposes:
- (a) Residential, including any dwelling units and rooming units, mobile homes or factory built housing, camping facilities, hotels, or other unit constructed or installed for occupancy on a 24-hour basis;
  - (b) A hospital for humans;
  - (c) Educational institutions such as a public or private school;
  - (d) A day care center for children; and
  - (e) Any use that would disturb or penetrate the facility cover as described in subparagraph 5.1 or interfere with the remedy as described in subparagraph 5.2 (e.g. construction of buildings).
- 5.4 Ground water uses: No activities shall be conducted on the Property that extract, consume, or otherwise use any groundwater from the Property, nor shall any wells be constructed on the Property for purposes other than ground water monitoring, unless approved by U.S. EPA.
6. MODIFICATION OF RESTRICTIONS: The land and groundwater use restrictions shall continue until and unless U.S. EPA, after consultation with TLD (if TLD is an extant corporation at that time), approves the modification or rescission of the restrictions. U.S. EPA may modify or terminate, in whole or in part, the restrictions set forth in Paragraph 5 in writing, as authorized by law. The owner of the Property may seek to modify or terminate, in whole or in part, the restrictions set forth in Paragraph 5 by submitting to U.S. EPA, the State of Illinois and TLD a written application that identifies each such restriction to be terminated or modified, describes the terms of each proposed modification, any proposed revisions to this notice and any proposed changes to the environmental easement and restrictive covenants applicable to the Property. Each application for termination or modification of any restriction set forth in Paragraph 5 shall include a demonstration by the owner of the Property that the requested termination or modification will not interfere with, impair or reduce:

- a) the effectiveness of any remedial measures at the Site;
- b) the long term protectiveness of the Remedial Action; or
- c) protection of human health and the environment.

If U.S. EPA, with the concurrence of Illinois EPA, makes a determination that an application satisfies the requirements of this paragraph, U.S. EPA will notify the owner of the Property in writing. If U.S. EPA does not respond in writing within 90 days to an application to modify or terminate any restrictions, U.S. EPA shall be deemed to have denied the owner's application. Any approved modification of the use restrictions shall be recorded with the Recorder of Deeds, Montgomery County, Illinois.

7. Access: The Property is subject to an irrevocable, permanent and continuing right of access by the United States (including EPA and its contractors), Illinois EPA (including its contractors) and TLD (including its contractors) at all reasonable times, upon reasonable notice, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

- a. Monitoring, investigation, removal, remedial or other activities at the Site;
- b. Verifying any data or information submitted to the United States;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, selecting, preparing for, and/or implementing response actions at or near the Site;
- f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by TLD or its agents related to response activity at the Site, consistent with the Consent Decree;
- g. Assessing TLD's compliance with the Consent Decree; and
- h. Determining whether the Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to the Consent Decree.

8. NO LIMITATION OF RIGHTS OR AUTHORITIES: Nothing in this document shall limit or otherwise affect U.S. EPA's or the State of Illinois' rights of entry and access or authority to take response actions under CERCLA, the NCP, or other federal or state law.

9. NO PUBLIC ACCESS AND USE: No right of access or use by the general public to any portion of the Property is intended or conveyed by this instrument.
10. INSPECTION AND ENFORCEMENT: In addition to the access rights set forth in Paragraph 8 and 9 above, the United States and the State of Illinois may enter the Property from time to time for the purposes of performing inspections, overseeing remedy implementation or enforcing the restrictions set forth in Paragraph 5 above after reasonable notice to the owners or the owners' representative.
11. PRIOR ENVIRONMENTAL DEED RESTRICTIONS. This Declaration of Environmental Restrictive Covenants supercedes the Environmental Deed Restrictions for the Property recorded by TLD on November 5, 2004 in Book 1034, Page 151.
12. NOTICES: Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

T.L. Diamond & Company, Inc.  
C/o  
William K. Dodds, Esq.  
Dechert LLP  
30 Rockefeller Plaza  
New York, New York 10112-2200

John M. Ix, Esq.  
Dechert, LLP  
Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104-2808

United States Environmental Protection Agency  
Superfund Division  
77 W. Jackson Blvd.  
Mail Code: SR-6J  
Chicago IL 60604-3590

Illinois Environmental Protection Agency  
Federal Site Remediation Section  
Division of Remediation Management  
1021 N. Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276

IN WITNESS WHEREOF, T.L. Diamond & Company, Inc. has caused this Notice to be signed in its name.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

T.L. Diamond & Company, Inc.

By: \_\_\_\_\_  
Theodore Diamond, President

STATE OF NEW YORK                    )  
  ) ss  
COUNTY OF NEW YORK                )

I, the undersigned, a Notary Public, in and for said County and State aforesaid, DO HEREBY CERTIFY, that THEODORE DIAMOND personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and Notary seal, this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 200\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_.